IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-759

ALBERTO SANCHEZ, et al

Petitioners,

v.

TUCSON UNIFIED SCHOOL DISTRICT NO. 1, et al,; UNITED STATES OF AMERICA; MARIA MENDOZA, et al., SIDNEY L. SUTTON and SALLY SUTTON, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT TUCSON UNIFIED SCHOOL DISTRICT NO. 1's BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does the fourteenth amendment require individual mailed notice of a proposed post-judgment post-remedy settlement in a school desegregation case involving only injunctive relief?

2. Did the Ninth Circuit err in determining that the contents of the notice of settlement in this case fairly apprised class members of the contents of the settlement and that the notice did not violate Petitioner's due process rights?

3. Did the Ninth Circuit err in upholding the post-judgment settlement in this case because the settlement included provision for payment of attorney's fees?

4. Did the District Court properly approve, after hearing, the School

District's proposed remedial plan in this school desegregation case; was notice given to the class members of this hearing, and is such notice necessary; and, must this remedial plan, after being adopted by the District Court, be subject to relitigation at a later settlement hearing?

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PREFATORY NOTE

This Brief in Opposition shall cite to the Petitioners' Appendix as "Pet. App.," followed by the appropriate portion and page of the Appendix, and in similar fashion will cite to the Appendix filed herewith as "Res. App.," again followed by the portion and page thereof.

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RESPONDENT TUCSON UNIFIED SCHOOL DISTRICT NO. 1's BRIEF IN OPPOSITION

Respondent Tucson Unified School District No. 1 (referred to herein as "TUSD #1") respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Ninth

Circuit's decision in this case. That opinion is reported at 623 F.2d 1338.

RESPONDENT TUSD #1'S STATEMENT OF FACTS AND OF THE CASE

This litigation was commenced in May, 1974, by Respondents Fisher, et al, seeking desegregation of Respondent TUSD #1's elementary and junior high schools and improvement of the quality of education for black students in those schools. Several months later, a separate action was filed by Respondents Mendoza, et al, seeking desegregation and education changes on behalf of Mexican-American students in TUSD #1's elementary, junior high and high schools.

After several years of discovery, a consolidated trial of the Fisher and Mendoza actions was held in January, 1977, before the Federal District Court

for the District of Arizona (referred to herein as the "District Court", or when the context permits the "Court"). On June 5, 1978, the District Court issued its Order, Findings of Fact, and Conclusions of Law. The Court found that TUSD #1 had failed to properly dismantle its former dual school system for blacks and non-blacks and that it had continued since 1954 to discriminate against black elementary and junior high school students through a series of acts and decisions designed to maintain and foster segregated schooling for blacks. The Court further found that no dual school system ever existed with respect to Mexican-Americans and rejected the claim that TUSD #1 had discriminated against Mexican-Americans at the high school level. Finally, the Court concluded that

only nine schools then suffered current effects of TUSD #1's past intentionally segregative acts. The Court ordered TUSD #1 to prepare a "proposed plan of desegregation" (referred to herein as the "Plan"), with respect to those nine schools only, "to commence with the beginning of the 1978-79 academic year, if possible." Pet. App. B, at 62.

TUSD #1 was also required by the District Court to consult with the Plaintiffs' attorneys and members of the Plaintiffs' classes with respect to the Plan for these nine schools in an effort to minimize objections to the Plan. Pet. App. C, at 66-8. Any remaining objections were to be submitted to the Court by Plaintiffs by August 2, 1978. Id. at 67.

The District Court scheduled a hearing on the School District's Plan for August 8, 1978, (hereinafter the "Plan Hearing"), and indicated that any member of the community would be permitted to appear at this hearing and present testimony or other evidence in opposition to, or in support of, the Plan. Id. at 69-71.

Post-trial motions were filed by the Plaintiffs Fisher and Mendoza, as well as the Plaintiff-Intervenor United States of America, seeking to convince the District Court that it had applied an incorrect standard in determining which schools within the District suffered present effects of past intentional segregation. Before the District Court ruled on these post-trial motions, the parties informed the Court that they were in the process of discussing not only a mutually

acceptable plan for desegregation of the nine schools, but also a formal settlement agreement for resolution of all other pending issues, including the matters raised in the post-trial motions. Accordingly, the Court--at the suggestion of the parties--held in abeyance its decision on those motions. The Court also ordered, however, that notwithstanding these discussions between the parties, TUSD #1 was to submit to the Court its proposed Plan of desegregation by the July 17, 1978, deadline. Pet. App. C.

TUSD #1 filed its proposed Plan as required on July 17, 1978. Res. App. II. Petitioner Sanchez, through his counsel, filed formal objections to the Plan. The Plan Hearing was held as scheduled on August 8 and 9, 1978. Evidence and

testimony was presented in favor of the Plan, and members of the community were given the opportunity to, and did, speak in support of or against the proposed Plan.

On August 11, 1978, the District Court entered an order adopting the Plan as the first phase of its desegregation remedy, consistent with its order of June 5, 1978. Pet. App. E. The Court found the Plan, including school closures, to be constitutionally adequate. Id.

Subsequent to the time that the Court rendered its August 11 Order, the parties filed documents evidencing a settlement of all the remaining issues (referred to herein as the "Settlement"). Pet. App. J. The Court scheduled a hearing for August 24, 1978, to consider the Settlement. Pet. App. D. As a

result of a request by Sanchez, this hearing was delayed until August 30 and 31, 1978 (referred to herein as the "Settlement Hearing"). Pet. App. G, at 108.

At the conclusion of the August 30 and 31 Settlement Hearing, the District Court entered an order approving the Settlement. Pet. App. I. On September 28, 1978, Petitioner Alberto Sanchez and other persons who opposed the Settlement[1] filed their notice of appeal, purporting to appeal from the August 31, 1978 Order and numerous earlier orders, including the August 11 Order approving the Plan. The Ninth Circuit's decision of June 27, 1980, affirmed all orders of the District

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[1]For convenience, Petitioners will cumulatively be referred to as "Sanchez".

Court, Pet. App. A, and Sanchez' Petition for Rehearing and Suggestion for Rehearing En Banc was denied on August 11, 1980. Pet. App. K. Sanchez then filed, on November 10, 1980, his Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit (referred to herein as "Petition"). The following is offered by TUSD #1 in response to Sanchez' Petition.

REASONS WHY THE WRIT SHOULD BE DENIED

I

PETITIONER HAS NOT PRESENTED TO THIS COURT ANY SPECIAL OR SUBSTANTIAL REASON TO GRANT REVIEW ON WRIT OF CERTIORARI.

In an attempt to convince this Court that important and special reasons are present which require review by writ of

certiorari of the Ninth Circuit's decision,[2] Sanchez alleges that it conflicts with a recent decision of the Seventh Circuit and with prior opinions of this Court. When Sanchez' arguments and the facts of this case are analyzed, however, it is apparent that there are no special or important, much less substantial, reasons indicating that review by this Court is either necessary or appropriate.

A. The Ninth Circuit's decision below is not in conflict with other circuit courts of appeal opinions.

On page 20 of his Petition, Sanchez argues that the Ninth Circuit's opinion

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[2]Rule 17, Rules of the Supreme Court of the United States, provides that review by writ of certiorari is granted only when there are important and special reasons therefor.

in this case is in conflict with the Seventh Circuit's decision in Armstrong v. Board of School Directors, 616 F.2d 305 (7th Cir. 1980). A review of Armstrong, however, indicates no conflict with the Ninth Circuit's opinion below.

In Armstrong, supra, the court affirmed in all respects settlement of a desegregation lawsuit involving the public schools of the City of Milwaukee. The settlement was submitted to the court after judgment on the merits but prior to any remedy being presented to, or ordered by, the district court. Contrary to Sanchez' suggestion, Armstrong did not discuss or resolve the issue of whether individual notice is constitutionally required in a post-judgment settlement of a desegregation lawsuit. While it is true that the notice of settlement in

Armstrong was delivered to all class members, Armstrong v. Board of School Directors, 616 F.2d at 310, the court did not hold, or even suggest, that the settlement would have been constitutionally deficient had an alternative method of notice been utilized.

The district court in Armstrong was faced with many of the same considerations presented to the District Court in this case. As stated by the court of appeals in Armstrong:

> The stage of the proceedings at which settlement is reached is important because it indicates how fully the district court and counsel are able to evaluate the merits of plaintiffs' claims. As discussed above, settlement of this litigation was reached at a very late stage, after the issues had been clearly identified, liability and impact had been decided, and a massive record had been compiled. The district court found, and we

> agree, that the litigation had progressed to a point at which counsel and the court were fully capable of evaluating the merits of plaintiffs' case and the probable course of future litigation. 616 F.2d at 325.

These factors, present in both Armstrong and the instant case, eliminate the need for an all encompassing rule requiring, in every case, individual mailed notice of a post-judgment settlement.

Not only is Armstrong easily distinguishable, but the Seventh Circuit has previously held that notice of compromise is not required where a class action suit has proceeded to judgment. Chlupsa v. Posvic, 113 F.2d 375, 376 (7th Cir. 1940). In addition, various circuits, including the Seventh Circuit, have considered the question of whether individual notice is required to commence class actions seeking injunctive and

declaratory relief. These cases, cited in the Response filed by Respondents Fisher, et al., uniformly hold that individual mailed notice is not required.

It is apparent that Sanchez' claim of conflicting results among the circuits is in error.

B. The Ninth Circuit's decision in this case does not conflict with any opinion rendered by this Court.

Sanchez has cited numerous opinions of this Court which have rejected notice by publication as constitutionally inadequate under the circumstances. Petition at 18. None of the cases cited, however, determines the type of notice required by the due process clause of the fourteenth amendment in a situation where (1) the settlement is executed after a full trial on the merits and after a remedy has been

ordered following a remedy hearing, and (2) the Plaintiffs in the underlying action sought an injunction rather than individual damages.[3] For this reason, the Ninth Circuit's decision is not in conflict with the cases cited by Sanchez or with any decision of this Court.

II

IN HIS ATTEMPT TO CONVINCE THIS COURT TO ACCEPT REVIEW BY WRIT OF CERTIORARI, SANCHEZ REPEATEDLY MISSTATES FACTS AND ASKS THIS COURT TO DRAW INFERENCES FROM THE EVIDENCE WHICH ARE UNWARRANTED AND ARE IN DIRECT CONFLICT WITH THE TRIAL COURT'S DETERMINATION AND THE DECISION RENDERED BY THE COURT OF APPEALS.

In his statement of the case, Petition at 1-16, and throughout his Petition, Sanchez presents many statements

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[3] It is difficult to imagine this procedural situation occurring in other than a class action desegregation lawsuit. Whether these unique circumstances will ever reoccur is at best speculative.

which are inaccurate or, at best, very misleading.[4] In addition, Sanchez draws inferences and conclusions from the evidence which are in direct conflict with the conclusions of the Ninth Circuit and the findings of the District Court. Sanchez asks this Court to draw these same inferences based on the very limited portion of the record contained in the Appendix to his Petition. Although TUSD #1 will make no attempt to discuss all or even most of the inaccurate or misleading statements contained in the Petition, it will direct this Court's attention to a

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[4]Additionally, because Petitioner retyped the materials contained in the Appendix to his Petition, many errors appear therein. This Respondent has endeavored to correct some of these errors in section XIV of its Appendix. No attempt was made to correct numerous spelling errors and it is probable that other errors are present that have neither been observed nor corrected.

few critical issues where Sanchez is in disagreement with the analysis of both the District Court and the Ninth Circuit.

A. The Plan is Separate from the Settlement

Sanchez repeatedly alleges in his Petition that the Plan submitted by TUSD #1 and approved by the District Court in its August 11, 1978, Order was a portion of the Settlement to be considered anew at the August 30-31 Settlement Hearing. Petition at 4, 5, 8-9, 10, 12, 28, 44, 45, 49. The Ninth Circuit and the District Court both held that the Plan was separate from the Settlement and not an issue to be considered at the August 30-31 Settlement Hearing. 623 F.2d at 1345-6. In view of the important nature of this disagreement, this issue is discussed in more detail below in section III of this Response.

B. Class Members were Given Notice of the Plan Hearing and School Closures

In addition to claiming that the desegregation Plan was a portion of the Settlement, Sanchez also argues that the Plan Hearing on August 8 and 9, 1978, was held without notice to the class. Petition at 8, 43, 51. This allegation, as Sanchez is fully aware, is inaccurate. Notice of the Plan Hearing was sent to parents of TUSD #1 students prior to the August 8, 1978 hearing.[5] Res. App. at I. This notice, in unequivocal terms, provided that (1) TUSD #1's proposed Plan included closure of specific schools, (2) a hearing would be held on August 8, 1978, to determine the constitutionality

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[5]Notice of this hearing was gratuitous, as the trial court judge had inherent power to implement a remedy without notice or hearing.

of the proposed Plan and (3) objections could be made to the Plan at the Plan Hearing by anyone desiring to do so. Id.

C. The Settlement was not Unfair to Members of the Mexican-American Class.

Sanchez attempts to convince this Court that the settlement was unfair with respect to the Mexican-American class. He states:

> Counsel for the Mexican-American class presented one witness in support of the proposed settlement. Her name was Olma [sic] Riggs and she testified that she had no place of residence, but lived in her Ford Pinto station wagon. Petition at 14.
>
> * * *
>
> A gross disparity in the benefits received [in the settlement] by the largest class emerges even without "close scrutiny" of the parties compromise. Petition at 36.

Sanchez' suggestion that the Settlement was unfair to the Mexican-American class is completely unwarranted.[6]

The Settlement required TUSD #1 to review and revise, if appropriate, minority enrollment in at least five schools which were not found by the District Court's June 5, 1978, Order to be operating unlawfully, but which historically had been predominantly Mexican-American. Pet. App. J, at 129-30. In addition, numerous witnesses testified on August 30 and 31 that the benefits resulting from many of the obligations imposed upon TUSD #1 in the Settlement would benefit Mexican-Americans as well as black students.

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[6]The Response filed herein by Respondents Mendoza, et al., addresses in more detail the issue of the Settlement's fairness vis-a-vis the Mexican-American class.

Res. App. X. Respondent TUSD #1's Appendix III duplicates three pages of TUSD #1's Brief before the Ninth Circuit containing just some of the benefits received by the Mexican-American class as a result of the Settlement. Sanchez' argument that the Settlement is unfair is simply untrue.

D. Every Issue Concerning Alleged Segregation in Tucson Public Schools was Fully Litigated.

Sanchez states on page 20 of his Petition that:

> The final compromise dismissed all claims alleging that the Mendoza class had been denied equal educational opportunities with prejudice and without a trial on the merits.

This statement and a similar statement by Sanchez on page 31 of his Petition are especially misleading. As the District

Court clearly recognized, this case involved one cause of action -- whether TUSD #1 was unconstitutionally discriminating against its students based on their race or ethnicity. Res. App. XII. The remaining "counts" in the complaint which were dismissed were adjuncts to and supported the primary discrimination issue and were not independent viable causes of action. An enormous amount of evidence was taken on every issue of each count of the complaint. As the District Court explained to counsel for Sanchez:

> [THE COURT]: And with the cursory examination, it should have been apparent that Count One of the plaintiffs in the Mendoza case, 74-204, was the crux of the complaint. Count One was the count that alleged the creation and maintenance of a tri-ethnic segregated system. Counts Two, Three, Four, Five, Six and Seven and Eight were

> merely adjuncts thrown in to support Count One.
>
> Now, the Court and counsel recognize this, that these matters weren't separate counts, weren't separate items to be litigated separate and apart from the main issue of discrimination or segregation, but that they were valid issues to be considered and valid issues on which evidence should be presented with respect to the main issue in the case, to-wit: Discrimination and segregation. Res. App. XII.

The District Court went on to note that evidence was presented on every count, including discriminatory tracking of students, inferior curriculum and facilities for minorities, discrimination in the hot lunch program, and failure to employ and promote Mexican-American staff. (Res. App. XII). Dismissal was an irrelevant formality.

E. Summary

Based on the limited portion of the record contained in his Appendix, Sanchez

asks this Court to evaluate the evidence and reach conclusions opposite to those reached by the District Court and the Ninth Circuit, both of which had the complete record before them. It would be particularly inappropriate to grant review under these circumstances. Cf. Carter v. Jury Commissioner of Greene County, 396 U.S. 320, 339-40 (1970) (Court reluctant to overrule factual determination of lower court).

III

THE DESEGREGATION PLAN, WHICH INCLUDED THE CLOSURE OF THREE SMALL INNER-CITY SCHOOLS, CONSTITUTED A COURT ORDERED REMEDY RATHER THAN A PORTION OF THE SETTLEMENT AND WAS NOT AN ISSUE TO BE CONSIDERED AT THE SETTLEMENT HEARING.

In an attempt to convince this Court that it should grant review of this case, and because he objects to the closure of three schools pursuant to the Plan,

Sanchez maintains that the Plan, and thus these school closures, were part of the Settlement rather than an event required by the District Court's August 11, 1978, Order. Petition at 4, 5, 8-9, 10, 12, 28, 44, 45, 49. The Ninth Circuit, however, correctly held that the question of school closure was resolved by the District Court's August 11, 1978, Order adopting the Plan, and properly was not the subject of discussion at the Settlement Hearing held August 30 and 31, 1978. 623 F.2d at 1345-6.

In his attempt to convince this Court that the Plan was a portion of the Settlement to be considered at the August 30-31 Settlement Hearing, Sanchez cites selective statements made by the District Court <u>after</u> the August 8, 1978 Plan

Hearing. This Court should not be misled by Sanchez' reliance on one or two sentences in the immense record which, when isolated and taken out of context, seem to suggest that a full opportunity to object to school closures might be possible at the Settlement Hearing. As the record clearly demonstrates, and as was correctly determined by the Ninth Circuit, the Plan--resulting in school closures--and the Settlement were separate, and further consideration of school closures was unnecessary after the District Court adopted and ordered implementation of the Plan by its Order of August 11, 1978.

The District Court's June 5, 1978, Order states that "Defendants shall propose a plan designed to eliminate any vestiges of racial and ethnic segregation

or discrimination . . . ." Pet. App. B, at 62. The document filed with the District Court on July 17, 1978, in response to this order was denominated DEFENDANTS' PLAN AND SUPPORTING MEMORANDUM. Res. App. II. This Plan was submitted by TUSD #1, not by any coalition of the parties or pursuant to the Settlement. Although the School District welcomed suggestions regarding formation of the Plan from other parties and their counsel, just as it welcomed input from the community , on neither July 12, 1978, when the Board of Education selected the preferred options, nor July 17, 1978, when the Plan was submitted to the

District Court had a settlement been executed by the parties.[7]

To allow the issue of school closures to be reviewed again at the Settlement Hearing would render meaningless the Plan Hearing on August 8 and 9, 1978, and the District Court's Order of August 11, 1978.

It is true that the Settlement filed August 11, 1978, incorporated the desegregration Plan as ordered into effect by the District Court's August 11, 1978, Order rendered earlier that same day. This, however, did not mean that the August 11 Order was subject to modification or review. The purpose of the

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[7]Final execution and filing of the Settlement did not occur until after the District Court's August 11, 1978, decision was rendered. The August 11, 1978, Order, Pet. App. E, was filed August 11 at 11:46 a.m. and the Settlement, Pet. App. J, was filed at 5:13 p.m.

Settlement Hearing was not to second guess or relitigate the District Court's prior Order. The August 11 Order was incorporated into the Settlement just as the Settlement could incorporate a statute or regulation, as a convenient method to present the complete remedial "picture" in one document.

Nothing in the record prior to the August 8 and 9, 1978, hearing could mislead Sanchez into believing that TUSD #1's Plan would be viewed as a Rule 23, Fed. R. Civ. Proc., class action settlement rather than a proposed judicial remedy, or that it would be subject to review again at any later time.

On August 7, 1978, during a hearing to discuss pending motions, counsel for TUSD #1 carefully explained the purposes of the scheduled hearings:

[MR. BRAMMER]

> All I've heard, Your Honor, is that people are opposed to the closing of schools. And if that's what we're talking about, this Court has identified tomorrow [August 8] as the date with which the School District can present evidence and people can suggest alternatives to the Court concerning the plan, then the Court has established the date of the 24th of this month [later changed to the 30th] for people to appear after notice and pursuant to Rule 23 concerning any settlement which finally gets filed with this Court. Res. App. IV.

Later in the same August 7 hearing, the District Court directly addressed the basic misunderstanding of Sanchez' counsel:

> MR. SALESE: Your Honor, . . . I think the Court has already set August the 24th for the time at which we deal with the plan, at least the school's plan.
>
> THE COURT: Well, no, we've designated tomorrow morning to

> deal with the desegregation plan. We set August 24th for the time to deal with the proposal or the settlement of this lawsuit and an opportunity for the members of the class to be heard on the proposed settlement overall. Res. App. V.

Considering the above statements, Sanchez' suggestion that he was misled by an ambiguous statement in an order issued three days after the Plan Hearing, Petition at 9, is clearly unpersuasive.

At the very beginning of the August 8 and 9 Plan Hearing, the court clearly delineated the purpose of that hearing:

> At the outset, I think the record should reflect that this is the time set for hearing on the defendants' proposed plan for desegregation pursuant to the Court's order. You may proceed. Res. App. VI.

Whenever the discussion drifted to matters not involved in the desegregation Plan but which were involved in the then

tentative Settlement, the Court was quick to note that the Settlement was not at issue in the hearing on the 8th and 9th of August, and that the Plan and Settlement were separate. For example, the following colloquy occurred between the Court and Mr. Pitt, a Tucson attorney and citizen who presented testimony at the Plan Hearing pursuant to the Court's Order.

> MR. PITT: . . . So what I am asking the Court to consider, in its wisdom, is that in looking at the stipulation and entering a final order in this matter - -
>
> THE COURT: Which, by the way, is not the scope or purpose of this hearing.
>
> MR. PITT: I understand that . . . Res. App. VII.
>
> * * *
>
> MR. PITT: I was just trying to find out what the intent of the stipulation was.

THE COURT: Well, perhaps they can give us both.

MR. SALTER: If he will come back on the 24th, Your Honor, we will define it for him.

THE COURT: And I think really that's the time when we should delve into that matter. What we're concerned with here now is Option Five [of the desegregation Plan] Res. App. VIII.

With another witness, the Court continued:

MRS. ENGLER: . . . The other thing I wanted to know is that, wouldn't it be just as valid, since both Safford and Spring are named in the Court order as having vestiges of segregative intent, . . . wouldn't the wording of paragraph number five in this document - -

THE COURT: Well, if you are talking about the settlement document now, we'll get into that matter in another hearing. What we are concerned with here is only insofar as it may relate to Option Five [of the desegregation Plan]. Res. App. IX.

In addition, despite the existence of a few ambiguous passages to which Sanchez repeatedly refers, the record is replete with references after August 8, 1978, indicating clearly the District Court's position that the August 11, 1978, Order was the final resolution of the issues presented by TUSD #1's proposed Plan. The District Court rejected subclass status to Sanchez on August 11, 1978, partly on the basis that it had just decided school closures on the merits. Pet. App. F, at 101. Eleven days later, on August 22, 1978, it granted Sanchez' discovery rights as to four different areas of inquiry, but denied discovery as to the issue of school closures because, in the District Court's words:

> . . . the desegregation plan adopted by the Court is now moot by virtue of the Court's Order of August 11, 1978. Pet. App. H, at 111.

At the August 30 and 31 Settlement Hearing, the District Court again recognized that the Settlement, although adopting the Plan, did not provide Sanchez with an avenue to relitigate the Court's August 11 Order. When counsel for Sanchez began to discuss the Plan, the District Court stated:

> [THE COURT]
>
> Well, let me disabuse your mind and cut this short. The Court has already ruled on that matter, and I'm not going to relitigate - - I'm not going to hear any more argument on it. So with respect to that, the Court has already heard and ruled upon that so don't dredge that up again. You've made your record on it and you are free to pursue your remedy on that matter. You are just wasting time now plowing that ground again.

MR. SALESE: Well, Your Honor, the problem I have - -

THE COURT: The problem you have is that you cannot seem to accept the fact that the ruling has been made on the desegregation plan. What we're concerned with now, and only with now is the settlement. Now, the fact that the settlement, in essence, adopts the Court's plan, that is of no consequence, really, insofar as the settlement is concerned. The Court independently made that determination. Now, if counsel want to accept it, that's fine; if they don't their remedy is to go to the Court of Appeals.

MR. SALESE: So as I understand it then from Your Honor, then the closure issue, the plans submitted are not part of the settlement?

THE COURT: The closure, insofar as the Court's order of desegregation is concerned, is not in issue. Res. App. XI.

In summary, Sanchez' assertion that the Plan and Settlement were inseparable is without merit.

The Ninth Circuit correctly recognized Sanchez' error in reasoning concerning the Plan Hearing in relation to the Settlement Hearing, stating:

> Many of Sanchez's complaints charging the District Court with failing to properly accommodate his objections to the school closures are grounded on a fundamental misunderstanding of the purpose of the plan hearing (August 8th and 9th) and the status of the school closure question following the August 11th order approving the desegregation plan. Sanchez's complaints that the school closure issue was not properly considered in the procedures surrounding the settlement hearing assume the continuing vitality of this issue after the August 11th order. What was and was not decided by the August 11th order, and what remained to be considered in the settlement proceedings, are determined by the law governing school desegregation remedies in the federal courts.
>
> When a federal court finds that a public school system operates in a manner infringing upon some students' federal

constitutional rights, the Court is empowered to prescribe a suitable remedy.

* * *

The hearing on August 8 and 9 was specifically and solely directed to the question of whether the District's desegregation plan remedied the constitutional violations found in the June 5th order, and whether it did so in a constitutional manner. The District Court's understanding of its role was consistent with the limited remedial jurisdiction of the federal courts in school desegregation cases. . . .

* * *

The Court's careful examination of the school closures determined that they would not place an undue burden on minority students. Finally, the District Court concluded that the proposed plans were 'acceptable remedies for the constitutional violations heretofore found.'

We believe the District Court properly perceived its role in reviewing the desegregation plan. The August 11th approval of the District's de-

> segregation plan was an independent judgment of the District Court conclusively deciding the permissibility of the plan, including the school closures, for the 1978-79 school year. 623 F.2d at 1345-6.

Sanchez' suggestion, Petition at 27, that United States v. ITT Continental Baking Co., 420 U.S. 223 (1975), United States v. Armour & Co., 402 U.S. 673 (1971), and United States v. Swift & Co., 286 U.S. 106 (1932), foreclose any result other than that the Plan was part of the Settlement, or that the Ninth Circuit "steadfastly ignored" these decisions is without merit. The record clearly demonstrates that the Plan was separate from the Settlement and the Ninth Circuit was correct in so holding.

IV

THE MANNER OF NOTICE OF THE SETTLEMENT HEARING SPECIFIED BELOW DID NOT VIOLATE PETITIONERS' DUE PROCESS RIGHTS.

Sanchez argues that his constitutional rights were violated by the manner in which notice of the Settlement Hearing was disseminated.[8] Without presenting to this Court an accurate portrayal of the factual situation before the District Court, Sanchez asks this Court to adopt a broad based rule requiring, under all circumstances, first-class mailed notice to effect a settlement of class action litigation under all circumstances.

This Court has never adopted an inflexible concept of due process requiring any specific manner of notice for the myriad of situations which can be

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[8]The issue of notice afforded Petitioners, its adequacy as to content and form, and the propriety of its dissemination is more fully addressed in the Response filed herein by the Respondents Fisher, et al., and the Respondent United States.

presented to a federal district court. The very nature of due process negates any concept of inflexible procedures universally applicable to every situation. Board of Curators v. Horowitz, 435 U.S. 78 (1978). Specifically, this Court has never required individual mailed or delivered notices where the purposes to be served by the notice and thus the requirements of the due process clause of the fourteenth amendment are adequately served by other means. Such is the situation in this case.

The purpose of a settlement hearing in cases involving structural injunctive remedies is to apprise the judge of enough facts so that he or she can determine whether the settlement is fair to all class members. Discovery rights

prior to hearing are properly limited to achieving this goal. City of Detroit v. Grinnell Corporation, 495 F.2d 448 (2d Cir. 1974); Robertson v. National Basketball Assoc., 72 F.R.D. 64 (S.D.N.Y. 1976), aff'd 556 F.2d 682 (2d Cir. 1977). Similarly, if the judge is aware of sufficient facts so that he or she can make an informed judgment on the proposed settlement, the hearing may be eliminated completely. Patterson v. Stovall, 528 F.2d 108 (7th Cir. 1976).

Notice in such cases is provided in order to serve the same purpose as the hearing - - that is, to assist the trial court judge in determining if the settlement is fair and equitable to class members by allowing objectors to come forward. The notice can be disseminated in any reasonable fashion to achieve this purpose.

The District Court judge in this case was presented with the following situation:

1. The underlying lawsuit alleging unconstitutional segregation of public schools had been fully and vigorously litigated on the merits after years of discovery. The litigation resulted in the District Court's 204 page Order of June 5, 1978, and its 265 page Appendix to that Order.

2. The trial on the merits of this action involved a massive presentation of evidence, and as a result thereof, the trial judge was thoroughly familiar with the issues concerning segregation and desegregation in TUSD #1 and with the parties and their counsel. Res. App. XII.

3. TUSD #1 submitted to the District Court a proposed Plan to remedy the present effects of past discriminatory practices which the Court, in its June 5, 1978, decision, found then existed at nine TUSD #1 schools. Res. App. II.

4. A full hearing, after notice thereof, was held concerning TUSD #1's proposed Plan on August 8 and 9, 1980.

5. By Order dated August 11, 1980, the District Court determined that the Plan submitted by TUSD #1 was constitutional and ordered it to be implemented immediately. Pet. App. C.

6. Immediately after the District Court's August 11, 1980, Order issued, a Settlement resolving all remaining issues in the case and other matters was executed and filed. Pet. App. J.

As a result of his extensive involvement in this case, the District Court was in a unique position to review the adequacy of the Settlement. As he stated during the August 30-31, 1978, Settlement Hearing:

> [The Court:] As counsel have indicated, this case has gone on for a long time. All the main counsel in the case and the Court have been living with this case. We all considered literally thousands upon thousands of pages of testimony, depositions, exhibits in this case. We have a whole room full of evidence that was presented in this case. It took Court and counsel a couple of years to collate and to consider all of that matter. Res. App. XII.
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> * * *
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> . . . [T]he time and effort expended on this case, as I stated eariler have been fantastic. It doesn't appear that any stone has been unturned. Res. App. XIII.

Thus, the notice afforded was more than that necessary to allow the District

Court to review the fairness of the Settlement with respect to all class members.

The situation described above presents a sharp contrast to the usual class action settlement which (1) occurs prior to litigation on the merits, and (2) in many cases involves a determination of damages due each individual class member, often at the expense of all other class members. In the usual case, the trial judge is not in a position to gauge the merits of a proposed settlement to determine if it is fair to all members of the class. The unique procedural posture of this case militates against review by this Court.

The District Court Judge in this action was fully informed of all facts necessary to protect the interests and

constitutional rights of every member of the class. The notice given served its function, and Sanchez suggests no new arguments of which the District Court and the Ninth Circuit were not fully cognizant. Given the unusual procedural history of this case, Sanchez' broad-ranging allegations of error lose any illusory attractiveness they would perhaps otherwise present.

V

THE SETTLEMENT SHOULD NOT BE OVERTURNED MERELY BECAUSE IT INCLUDES PROVISION FOR PAYMENT OF ATTORNEYS' FEES

Sanchez asks this Court to overturn the Settlement and disrupt the ongoing process of desegregating various schools within TUSD #1 because payment of Plaintiffs' attorneys' fees was included

in the Settlement. Petition at 32-42. TUSD #1 believes not only that there is no merit to this contention, but also that the issue was adequately addressed and properly resolved by the Ninth Circuit's opinion.[9]

The propriety of inclusion of attorneys' fees in the Settlement hinges upon a determination of the reasonableness of the amount settled upon and the adequacy of representation provided to the class during the negotiations. If, as in the present case, the record indicates that the representation of the class was

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[9]The Response filed herein by the Respondents Fisher, et al. will address in more detail the propriety of including attorneys' fees in the Settlement of this action and the Response filed by the United States of America will discuss in more detail the appropriateness of the Ninth Circuit decision concerning this issue.

adequate and that the settlement was fair, then there is no error. In Re General Motors Corp. Engine Interchange Litigation, 594 F.2d 1106, 1131-2 (7th Cir.), cert den. 444 U.S. 870 (1979).

The District Court in this case thoroughly reviewed the Settlement and found it to be fair and reasonable. Pet. App. I. The trial judge's extensive involvement with this case and familiarity with counsel for all parties cannot be ignored. See, Armstrong v. Board of School Directors, 616 F.2d 305, 319 (7th Cir. 1980) (in approving post-trial settlement of desegregation lawsuit which included payment of attorney's fees, court noted that the trial judge's "familiarity with the litigants and the litigation is a valuable asset which should not lightly be discarded.")

During the Settlement Hearing, attorneys for Fisher, et al, and Mendoza, et al, submitted to the District Court documentation evidencing approximately 11,000 hours of attorney and law clerk time and over $153,000.00 in out of pocket expenses. Res. App. XIII. Counsel for Sanchez chose not to examine counsel for Plaintiffs regarding attorney's fees although given the opportunity. In fact, counsel for Sanchez expressly stated that there was no dispute concerning the validity of the hours or costs submitted by the attorneys for the Plaintiffs. Id. Had Plaintiffs' counsel unfairly compromised their clients' interest in return for attorneys' fees, the District Court Judge would have perceived such a situation immediately because of his extensive

involvement over the long course of this litigation. To the contrary, the District Court commented favorably concerning the exhibit offered concerning fees and costs. Res. App. XIII, at 82.

The record contains no hint or evidence of collusion. Attorneys' fees were discussed at the insistence of TUSD #1, not Plaintiff's counsel, Pet. App. Q and R, because the school district wished to include all remaining issues in the Settlement. The letters of negotiation transmitted between the parties, and referenced by Sanchez in his Appendix, evidence an understanding among the parties that the issue of attorneys' fees could be separated from the other negotiations if no agreement could be reached as to amount, Pet. App. T, at 213, and

that attorney's fees were secondary to an overall settlement. Id.

If the Ninth Circuit had expressed general approval of simultaneous negotiation of attorneys' fees in a class action settlement, perhaps reason would exist for this Court to accept review of this case. The Ninth Circuit's decision, however, clearly disapproves such a procedure. 623 F.2d at 1352-3. Despite the general disapproval, after reviewing the complete record herein, the Ninth Circuit found that due to the unique circumstances present and "neutralizing elements" such as the Government's participation in the case, there was no error. 623 F.2d at 1353. The unique circumstances present in this case include the following:

1. The attorney's fees agreement and settlement negotiations occurred

post-trial and post-judgment;

2. 20 U.S.C. §1617 provided for payment of attorneys' fees to Plaintiffs' counsel regardless of the existence of a settlement;

3. The United States Government joined in and approved the Settlement; and

4. Sanchez did not contest the reasonableness of the amount of the attorney's fees or costs.

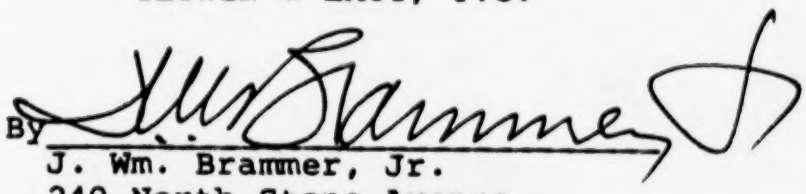
Under these circumstances, reversal of the District Court's approval of the settlement was properly deemed by the Ninth Circuit to be unnecessary and inappropriate. No policy or legal reason exists for this Court to overturn the Ninth Circuit's carefully reasoned decision on this issue.

SUMMARY

Sanchez' objections to the Ninth Circuit's decision are without merit, and, in any event, do not justify setting aside the efforts that every party to this lawsuit has expended for over the past two years to insure that the students in TUSD #1 receive equal educational opportunities as guaranteed by the fourteenth amendment to the United States Constitution. For the above reasons, Respondent TUSD #1 asks this Court to deny review of Sanchez' Writ of Certiorari.

RESPECTFULLY submitted this 29th day of December, 1980.

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